

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KENNETH WASHINGTON, D-14198,)	
)	
Petitioner,)	No. C 13-3438 CRB (PR)
)	
vs.)	ORDER REQUESTING
)	MOTION TO DISMISS OR
STU SHERMAN, Acting Warden,)	NOTICE THAT MOTION IS
)	UNWARRANTED
Respondent.)	
_____)	

I.

On October 3, 1994, petitioner was convicted by a jury in Santa Clara County Superior Court of two counts of first degree burglary. The jury also found that petitioner had nine prior “strike” convictions and, on March 3, 1995, the court sentenced him to a prison term of 60 years to life.

On October 29, 1996, the California Court of Appeal reversed one of the burglary counts, affirmed the other and remanded the matter for resentencing. On February 19, 1997, the Supreme Court of California denied review.

On April 25, 1997, petitioner was resentenced to another indeterminate life sentence and, on November 19, 1997, the California Court of Appeal affirmed the judgment of the trial court. Petitioner did not seek further direct review.

Years later, petitioner began seeking habeas corpus relief from the state courts. On June 12, 2013, the Supreme Court of California denied petitioner’s final state petition for a writ of habeas corpus.

1 conviction or other collateral review is pending is excluded from the one-year
2 time limit. Id. § 2244(d)(2).

3 A state prisoner with a conviction finalized after April 24, 1996, such as
4 petitioner, ordinarily must file his federal habeas petition within one year of the
5 date his process of direct review came to an end. See Calderon v. United States
6 District Court (Beeler), 128 F.3d 1283, 1286 (9th Cir. 1997), overruled in part on
7 other grounds by Calderon v. United States District Court (Kelly), 163 F.3d 530
8 (9th Cir. 1998) (en banc). The instant petition appears untimely because it was
9 not filed until July 25, 2013, more than a year after petitioner's process of direct
10 review came to an end. And although petitioner sought state collateral relief
11 which may toll the one-year time limit under § 2244(d)(2), it appears that he did
12 not begin doing so until after the limitation period presumably expired in 1998.
13 This apparent untimeliness problem should be addressed before the court reaches
14 the merits of all the claims raised in the petition. If the petition is time-barred,
15 the litigants and court need not expend resources addressing all the claims in the
16 petition.

17 Accordingly, pursuant to Rule 4 of the Rules Governing Habeas Corpus
18 Cases Under Section 2254, respondent shall either (1) move to dismiss the
19 petition on the ground that it is untimely, or (2) inform the court that respondent
20 is of the opinion that a motion to dismiss is unwarranted in this case. If
21 respondent moves to dismiss the petitioner as untimely, he shall address
22 petitioner's claim of actual innocence in the motion. See McQuiggin v. Perkins,
23 133 S. Ct. 1924, 1931-32 (2013) (holding that actual innocence showing applies
24 to claims filed after AEDPA statute of limitations has run, as well as to
25 successive, abusive and procedurally defaulted claims); Lee v. Lampert, 653 F.3d
26 929, 931 (9th Cir. 2011) (en banc) (same).

III.

Good cause appearing therefor,

1. The clerk shall serve by certified mail a copy of this order and the operative petition (docket #8) and all attachments thereto upon respondent and respondent's attorney, the Attorney General of the State of California. The clerk also shall serve a copy of this order on petitioner.

2. Respondent shall file with the court and serve upon petitioner, within 60 days of the issuance of this order, a motion to dismiss the petition as untimely or a notice that respondent is of the opinion that a motion to dismiss is unwarranted.

3. If petitioner wishes to oppose the motion to dismiss, he shall do so by filing an opposition with the court and serving it upon respondent within 28 days of his receipt of the motion to dismiss.

4. Respondent may file and serve a reply within 14 days of receipt of petitioner's opposition.

5. The motion shall be deemed submitted as of the date the reply brief is due. No hearing will be held on the motion unless the court finds that an evidentiary hearing is required.

6. If respondent notifies the court that a motion to dismiss is unwarranted or the motion is denied, the court will then determine whether to require an answer to the petition.

SO ORDERED.

DATED: Feb. 24, 2014



CHARLES R. BREYER
United States District Judge